Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ERNEST A. JANIK, JR. INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK; LEAH EILEEN JANIK, INDIVIDUALLY ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a clearly erroneous and serious miscarriage of justice is produced by the Fifth Circuit's practice of effectively ignoring or deleting the phrase **"other misconduct"**, as that phrase appears in ***Fed.R.Civ.P. Rule 60(b)(3)***, – by virtue of the 5th Circuit Court of Appeals denying ***Rule 60(b)(3)*** relief to a movant, unless that movant can clearly and convincingly prove some kind of **"fraud"** or **"misrepresentation"** in pre-trial discovery or in trial tactics, – as opposed to that court recognizing and remedying documented "unfair surprise" – predicated varieties of **"other misconduct"** that prevented the plaintiffs from "fully and fairly" litigating their claims in a partial summary judgment-limited case, – in a jury trial context wherein:

(A) such unfair surprises were based upon defendant's prejudicial failures to comply with the automatic disclosure requirements of ***Fed.R.Civ.P. Rules 26(a)(1)*** and ***26(e)(1)***;

and

(B) such unfair surprises were exacerbated by unfair document non-production and/or expert witness collusion, as well as improper partial summary judgments –

such that the 5th Circuit's current practice of ignoring the proffered evidence of such **"other misconduct"** justifies a ***Rule 60(b)(3)***-based reversal and remand for new trial, – because:

i) such a narrow construction of ***Rule 60(b)(3)***'s **"other misconduct"** phrase conflicts with the ***Rule 60(b)(3)***

QUESTION PRESENTED – Continued

norms recognized and enforced in other federal circuits (such as the 1st, 4th, 7th, 11th, and Federal Circuits), such that current disparity in applying *Rules 60(b)(3)*'s **"other misconduct"** phrase's proper meaning in the 5th Circuit requires correction, in order to avoid regional inequalities in enforcing *Rules 26(a)(1), 26(e)(1),* and *60(b)(3);*

and/or

ii) such a narrow construction of *Rule 60(b)(3)*'s **"other misconduct"** phrase represents a clearly erroneous view (and failure) of **5th Amendment**-based procedural Due Process;

and/or

iii) such a narrow construction of *Rule 60(b)(3)*'s **"other misconduct"** phrase reversibly compromises the proper ambits and applications of **7th Amendment** trial-by-jury rights.

PARTIES TO THE PROCEEDINGS

Although this litigation has involved the City of Dallas and a variety of insurance defendants, petitioners believe that only three defendants have an interest in this Petition for Writ of Certiorari, namely: **Amica Mutual Insurance Company; Nobel Service Corporation; and IAS Claim Services, Inc.**

The Petitioners herein are the plaintiffs below, **Ernest A. Janik, Jr. and Leah Eileen Janik, individually and on behalf of their minor sons, Grant Joseph Janik and Tyler Newman Janik.**

The defendants at the trial court level were seven: the **City of Dallas, Texas**, an incorporated municipality, plus the following six "insurance defendants" (whose d/b/a's are omitted as irrelevant to this appeal): **Amica Mutual Insurance Company**, a Rhode Island company, **Nobel Service Corporation**, a Delaware corporation **IAS Claims Services, Inc.**, a Delaware Corporation, **Nobel Holdings, Inc.**, a Delaware corporation (dismissed by summary judgment prior to trial), **Insurance Adjustment Services of Texas, Inc.**, a Texas corporation (dismissed by agreement), and **Floyd Myers** (dismissed by agreement).

Of the seven trial court level defendants, only the following four were parties at the circuit court of appeals level: the **City of Dallas, Texas, Amica Mutual Insurance Company, Nobel Service Corporation**, and **IAS Claim Services, Inc.** At the circuit court of appeals level there was one appeal that involved the **City of Dallas, Texas**, namely 5th Circuit Appeal No. **98-10781**, which followed

PARTIES TO THE PROCEEDINGS

a summary judgment favoring that city, *cert. denied* as No. 00-684 (2001).

A trial was had on some of the Janiks' claims against three of the insurance defendants. An appeal that did not include the City of Dallas as a party (but which arose from the same civil action) followed said trial, namely, 5th Circuit Appeal No. **98-11369**, and a related appeal, No. **99-11385**. This petition directly relates only to 5th Circuit Appeal No. **99-11385**.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	v
APPENDIX CONTENTS	vi
TABLE OF AUTHORITIES	viii
OPINIONS AND DECISIONS BELOW	1
JURISDICTION	1
FEDERAL LAWS INVOLVED	1
STATEMENT OF THE CASE	2
Procedural History	2
Statement of Relevant Facts	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	24

APPENDIX CONTENTS

Page

APPENDIX'S PART "A":

Summary Calendar (5th Circuit, entered 1-11-2001) A-1

Order (Doc #448, entered 11-16-1999) A-11

Mem. Opinion & Order (Doc #442, entered 10-29-1999) A-12

Order (Doc #419, entered 11-19-1998) A-19

Court's Charge/Verdict (Doc #393, filed 8-27-1998) A-20

Order (5th Circuit, entered 2-22-2001) A-25

Judgment (Doc #394, entered 5-28-1998) A-27

APPENDIX'S PART "B":

U.S. Constitution's 5th Amendment, Due Process Clause B-1

U.S. Constitution's 7th Amendment, Trial by Jury Clause B-1

Fed.R.Civ.P., Rule 26 ..... B-1

Fed.R.Civ.P., Rule 56 ..... B-12

Fed.R.Civ.P., Rule 60 ..... B-15

APPENDIX CONTENTS – Continued

Page

APPENDIX'S PART "C":

Notice of Appeal (**Doc #449**, filed 12-14-1999) C-1

Janik's Supplemental Declaration (**Doc #447**, filed 11-15-1999) C-4

Janik's Authentication Declaration (**Doc #446**, filed 11-15-1999) C-22

TABLE OF AUTHORITIES

Page

CASES

Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425 (6th Cir. 1996) 13

A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020 (Fed. Cir. 1992) 16

Anderson v. Cryovac, 862 F.2d 910 (1st Cir. 1988) 13, 14

Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 910 (1st Cir. 1988) 16

Fraige v. American-Nat'l WaterMattress Corp., 996 F.2d 295 (Fed. Cir. 1993) 3, 15

Hickman v. Taylor, 329 U.S. 495 (1947) 18

Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998) 5, 16, 17

Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998) 3, 7, 18

Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1993) 3, 6

MMAR Group, Inc. v. Dow Jones & Co., Inc., 187 F.R.D. 282 (S.D. Tex. 1999) 14

Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993) 18

Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994) 3, 15

United States v. One Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981) 3, 14

United States v. Proctor & Gamble, 356 U.S. 677 (1958) 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Consttn., 5th Amendment 2, 3

U.S. Consttn., 7th Amendment 2, 3

STATUTES

Certiorari jurisdiction statute, codified at 28 U.S.C. § 1254(1) 1

Clean Water Act, codified at 33 U.S.C. §§ 1251 et seq. 1, 2

Resource Conservation & Recovery Act, codified at 42 U.S.C. §§ 6910 et seq. 1

Texas Deceptive Trade Practices Act ["DTPA"], codified at Tex. Bus. & Com. Code §§ 17.46, 17.50, etc. 11

FEDERAL RULES

Supreme Court Rule 10(a) 3

Fed.R.Civ.P., Rule 26 ..... *passim*

Fed.R.Civ.P., Rule 26(a) 7, 10, 19, 24

Fed.R.Civ.P., Rule 26(a)(1) ..... *passim*

Fed.R.Civ.P., Rule 26(a)(2)(B) 2, 9, 12

Fed.R.Civ.P., Rule 26(e)(1) ..... *passim*

Fed.R.Civ.P., Rule 26(e)(2) 1, 2

Fed.R.Civ.P., Rule 56(e) 1, 10

Fed.R.Civ.P., Rule 59 25

TABLE OF AUTHORITIES – Continued

Page

Fed.R.Civ.P., Rule 60(b) 2, 4, 24, 25

Fed.R.Civ.P., Rule 60(b)(2) 23

Fed.R.Civ.P., Rule 60(b)(3) ..... *passim*

OTHER AUTHORITIES

Brunet, "Summary Judgment Materials" 137 F.R.D. 647 (1993) 10

OPINIONS BELOW

The district court and Fifth Circuit rulings listed are unpublished decisions. As copied in Appendix Part "A", they are:

Summary Calendar	1-11-2001 [*5th Cir.*];
Order	11-16-1999 [*#448*];
Mem. Opinion & Order	10-29-1999 [*#442*];
Order	11-19-1998 [*#419*];
Court's Charge/Verdict	[8-27-1998 [*#393*];
Order	2-22-2001 [*5th Cir.*];
Judgment	5-28-1998 [*#394*].

JURISDICTION

Petitioners' timely appeal in the court of appeals below was denied by an order entered **January 11, 2001** (see Appendix Part "A"). A timely petition for panel rehearing was thereafter denied by the Fifth Circuit panel by an order entered **February 22, 2001**. This Court's jurisdiction is now invoked under 28 U.S.C. § 1254(1), the certiorari statute.

FEDERAL LAWS INVOLVED

This litigation arose as a "federal question" suit involving Clean Water Act, and Resource Conservation & Recovery Act, but interpretations of those statutes are not directly relevant to this petition. Rather, the pivotal federal laws herein are: Fed.R.Civ.P., Rules 26(a)(1), 26(e)(1), 26(e)(2), 56(e), and 60(b)(3), as well as the U.S.

Constitution's 5th and 7th Amendments. The text of these laws are provided in **Appendix Part "B"**.

STATEMENT OF THE CASE

Procedural History. In this appeal (**Appeal #99-11385** in the Fifth Circuit) the Janiks were plaintiffs who requested post-trial relief under **Fed. R. Civ. P. Rule 60(b)(3)**, especially as to how Rule 60(b)(3) relates to various portions of Fed.R.Civ.P. Rule 26, especially the automatic production mandates[1] of Rules 26(a)(1), 26(e)(1), and 26(e)(2), as such may relate to Rule 60(b)(3) "misconduct". The trial court's decision (to deny Rule 60(b)(3) relief) was adopted by the Fifth Circuit panel, as the legal justification of that panel's affirmance of the trial court's denial of Rule 60(b) relief.

Statement of Relevant Facts. During 1993 untreated sewage wastewaters of the City of Dallas were, without warning, discharged in a manner not authorized by the city's EPA-issued Clean Water Act/NPDES permit ("polluter's permit"), with most of the wastewaters invading the home of the Janiks prior to its draining into the Trinity River. This physical invasion of the Janiks property by myriad gallons of untreated municipal sewage wastewaters, and airborne biohazardous contaminants therefrom, substantially and illegally interfered with the Janiks' use and enjoyment of their home and related personal property items, and sickened them. **Doc #85 @ 3-19**.

The Janiks were insured by AMICA. In connection with insurance claims timely filed by the Janiks, for property losses insured by AMICA (adjusted by IAS/NOBEL),

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[1] including insurance defense trial expert reports mandated by Fed.R.Civ.P. Rule 26(a)(2)(B).

the Janiks were treated deceptively and unfairly (**Doc #393 @ pages 22, 26, 29**), so the Janiks ultimately brought suit in 1995. At trial, the defendants' usage of quasi-scripted testimony about various topics not disclosed in expert report (*e.g., unproduced "#1 consumer ratings", and about AMICA's purported policy of "**giving insureds the benefit of the doubt**", etc.*) caused unfair surprises and prejudices to the Janiks' ability to fully and fairly litigate this case at trial. See **Docs #447** and **#446** (*see* **Appendix, Part "C"**, *showing verified support of kinds of prejudice to Janiks' trial preparation*).

REASONS FOR GRANTING THE PETITION

This federal question involves a "split" in the circuit courts of appeals on the proper usage of Rule 60(b)(3) – especially as it applies to remedying violations of Rule 26(a)(1) and Rule 26(e)(1), – obviously an important federal question directly related to 5th Amendment Due Process and 7th Amendment Trial by Jury safeguards. Contrast this case with, *e.g.*, Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998); United States v. One Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981); Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994); Fraige v. American-Nat'l Watermattress Corp., 996 F.2d 295 (Fed. Cir. 1993); Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1993); etc. (*See, accord,* Supreme Court Rule 10(a), regarding "conflicts" in the circuit courts of appeals.)

This case involves the combined effect of a "tilted" jury selection process with unfair surprises at trial that reveal either: (1) trial expert disclosure violations, such that the plaintiffs (Janiks) were *unfairly surprised* and unfairly prejudiced by the defendants' "hiding" discoverable information needed to "fully and fairly" litigate their insurance claims at trial; and/or (2) trial expert collusion.

For example, the following topics, among others, were surprisingly mouthed at trial by defense experts who never disclosed such positions before trial:

(a) **AMICA's so-called "#1 consumer ratings"**, see **Doc #447's pages 6, 8**, and **Doc #446** at **¶¶** 1m, 2a, 3i, 3k;

(b) **AMICA's "benefit of the doubt"** (to its insureds) **policy**, see **Doc #447's pages 5, 9**, and **Doc #446** at **¶¶** 1p, 1r, 2f, 3a, 3i, 3o, 3q, 3r, and 3s;

(c) **"generally accepted claims handling practices** see **Doc #447's pages 5, 12-13**, and **Doc #446** at **¶¶** 1o, 1p & 4b (*re "emergency service"*), 1s & 5 (*re tactics abusing insured rel. to privacy/confidentiality agreement*), 2b, 2d, 2e, 2g, 3d, 3f, 3g, 3h, 3j, 3m, 4a (*unproduced "phone log"*), 4d;

(d) **defense experts testifying outside of basis and opinions disclosed in Rule 26(a) expert reports**, see **Doc #447's page 11**, and **Doc #446** at **¶¶** 1b, 1c, 1d, 1e, and 3n;

(e) **defense attorneys' misuse of both opening and closing jury arguments**, see **Doc #446** at **¶¶** 1f, 1g, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3l, 3m, 3n, 3o, 3p, 3q, 3r, 3s; and

(f) the supposed **"100% germ-free"** demand, see **Doc #447's pages 5, 10**, and **Doc #446** at **¶¶** 1l, 2c, 3e, 3r;

(g) the **withholding the adjustor "re-cap notes"**, see **Doc #447's pages 4-5**, and **Doc #446** at **¶** 4c.

Please notice that the summary pages of the above-noted **Doc #447** and **Doc #446** [*such post-trial documents being verified declarations* **proving various Fed.R.Civ.P.** ***Rule 60(b)(3) issues***] are reproduced in **Part "C"** of this petition's **Appendix.** Also, the "trial by ambush" tactics were prejudicially exacerbated, because some prospective

jurors were screened out and eliminated by leading questions about whether they had ever felt cheated by an insurance company (*and thus might be inclined to be "unfair" to AMICA*), or whether they didn't like how any insurance claim was handled, – *as opposed to whether they have ever been cheated by AMICA in particular,* – or whether they leaned in favor of insurers or insurance claims adjustors (if they liked how their claims were handled).

The pivotal point here is that **the defendants have not indicated when and how they provided this information, via Rule 26 or via discovery responses.** They failed. This failure, in conjunction with their prepping their witnesses to all sing the same "songs" (see **Doc #443**), proves that the information was made available to the defendants' "outside" experts, yet was withheld from the Janiks – with the result being **"trial by ambush"**[2] on several material facts that combined to mislead and taint the jury. This Court should grant a reversal, to correct the Fifth Circuit's erroneous application of its improper standard for identifying and remedying Rule 60(b)(3) – relevant "other misconduct". The Fifth Circuit has rendered the phrase "other misconduct" empty. By not reaching (*much less directly discussing*) the critical criterion of Rule 60(b)(3)'s federal norm of **"other misconduct"** as acts not being limited to "fraud on the court" or to any willful discovery resistance, the Fifth Circuit panel ratified, and thus applied, an inaccurate legal standard when denying the Janiks' Rule 60(b)(3) motion, and the later motion to reconsider such. (*See* **Petition for Panel Rehearing @ 6-9.**)

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[2] Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998) (**trial by ambush justifies Rule 60(b)(3) relief to void unfair surprises**).

By adopting the trial court's errors in its legal conclusions, the Fifth Circuit has likewise reached conclusions (*and its affirmance*) on a clearly erroneous base.

A nationally problematic litigation crisis illustrated by this case *is the need for litigants to comply with* **the *automatic disclosure mandates of Rule 26(a)(1) and Rule 26(e)(1), and the concomitant need for federal courts* to enforce the rule-mandated obligations.** Thus, the appellate panel's ratification of the trial court's non-enforcement of such automatic disclosure requirements (i.e., those mandated by Rules 26(a)(1) and 26(e)(1)), constituted clear error. Also, the Fifth Circuit panel did not correct the trial court's error regarding prejudicial closing argument – the "ringing" of a bell that cannot be "unrung" once the jury has heard it. *Cf., accord,* Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1995) (***reversing a denial of Rule 60(b)(3) relief, due to tainting the jury by improper closing argument***). *See* **Petition for Panel Rehearing @ 6.**

Why are such discovery abuse matters **relevant** to Rule 60(b)(3)-based motions? Because part of each of the Janiks' Rule 60(b)(3) motions focused on surprise, *e.g.*, the undisclosed **"claims-handling documentation practices"** of AMICA (and of IAS/NOBEL), as well as the undisclosed **"customer satisfaction"** rating of AMICA, a supposed **"#1 consumer rating"** touted repeatedly at trial. These surprising opinion-"foundations" even appeared, at trial, from the mouths of "outside" defense experts who had never mentioned such in their Rule

26(a)-mandated expert reports![3] Moreover, AMICA had failed to otherwise provide any such documents during discovery (despite the Janiks' requesting such information via Rule 34 (see Doc #443). ***Defendants imply that Fed.R.Civ.P. Rule 26(a)(1) and Rule 26(e)(1) non-compliances can never constitute "other misconduct" under Rule 60(b)(3).*** Critically, the defendants ignore reply to plaintiffs' Rule 26(a) mandatory disclosure violation points. Some representative non-disclosed trial surprises are listed hereinbelow.[4]

To date, no appellate response brief cites any Rule 26(a) disclosure by any defendant that provided such "surprise" information, nor did any produced claim files include any such information. Compare this with 3RD AMENDED COMPLAINT allegations that triggered Rule 26(a) document disclosure duties, *e.g.*:

(a) **AMICA's so-called "#1 consumer ratings", see Doc #443's page 10** (re 3RD AMENDED COMPLAINT ¶ 48 and ¶ 38(g));

(b) **AMICA's "benefit of the doubt" policy, see Doc #443's page 10** (re 3RD AMENDED COMPLAINT ¶ 38(m));

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[3] *See* Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998) (**unfair surprise from expert who opined on a new area of testimony at trial, *defeating disclosure principle regulating expert reports,* was "highly prejudicial" and justified Rule 60(b)(3)'s new trial**).

[4] **Fed.R.Civ.P. Rule 26(a)(1) indicates that disclosures are mandated for documents "relevant to disputed facts alleged with particularity in the pleadings[.]"** *Complained-of noncompliances with Rule 26(a)(1) in this case* **also** *violated production-of-documents* **supplementation** *duties mandated by* **Rule 26(e)(1).**

(c) **"generally accepted claims handling practices, see Doc #443's pages 13-17** (re 3RD AMENDED COMPLAINT ¶ 38, ¶ 38(e), ¶ 38(f), ¶ 38(i), ¶ 38(j), ¶ 38(l), ¶ 38(m), ¶ 38(p), ¶ 38(q), ¶ 38(r), ¶ 43, ¶ 44, ¶ 45, ¶ 46, ¶ 48, ¶ 63, ¶ 72g, ¶ 72h, ¶ 72p, ¶ 72q, ¶ 72r, ¶ 72x, and ¶ 83);

(d) the supposed **"100% germ-free"** demand, **see Doc #443's page 19** (re 3RD AMENDED COMPLAINT ¶ 72g);

(e) the **withholding the adjustor "re-cap notes", see Doc #443's page 18** (re 3RD AMENDED COMPLAINT ¶ 43, ¶ 44, and ¶ 63); and

(f) **who 'IAS' is or was, see Doc #443's pages 11-12** (re 3RD AMENDED COMPLAINT'S ¶ 38(q), ¶ 46, ¶ 69, ¶ 74, ¶ 84, ¶ 84(h), ¶ 84(i), ¶ 84(l)).

Despite such pleadings by the Janiks, such Rule 26(a)(1)/(e)(1) disclosure productions by defendants never occurred. **These failures have not been refuted by any of the defendants,** who merely rely on denying that propounded discovery fairly "trapped" certain document categories, **necessarily implying that there existed no other legal duty to produce those documents!** See **Doc #443** (JANIKS' 11-15-1999 MOTION FOR REHEARING); see also **Doc #447** and **Doc #446**, provided via **Appendix Part "C"**.

Moreover, notwithstanding the district court's conclusory footnote #3 (*on page 3 of its 10-28-1999 ruling*), the Janiks did identify at the trial court level (*in Doc 443*) several portions of their pleadings that triggered Rule 26(a)(1)'s mandatory document disclosure requirements – as to AMICA's (and IAS/NOBEL's) "generally accepted"

claims-handling documentation practices[5] (see 3RD AMENDED COMPLAINT, ¶ 38, ¶¶ 38(e)-(f), ¶¶ 38(i)-(j), ¶¶ 38(l)-(m), and ¶¶ 38(p)-(q) *in Doc* #443).

Likewise, the Janiks' discovery requests should have "flushed out" AMICA's supposed reputation for "#1" customer satisfaction (see 3RD AMENDED COMPLAINT, ¶ 48, ¶ 38(g) and ¶ 38(m)).[6]

Regarding AMICA's undisclosed advertizing-related business reputation (*e.g., "#1 consumer ratings"* and *"AMICA always gave the insured the benefit of the doubt", which related themes were both buttressed by IAS/NOBEL's trial behavior*), AMICA and IAS/NOBEL both committed *discovery misconduct* that prevented the Janiks from "fully and fairly" preparing to litigate the triable issues at trial, thus violating Rule 60(b)(3) concerns, such that the trial conducted was not a fairly litigated contest of the triable issues.

Regarding AMICA's and IAS/NOBEL's improper, evasive, and willful refusal to timely provide production of the "IAS" claims adjustor's so-called "re-cap notes" –

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[5] **These were never produced,** – they were never disclosed in Rule 26(a)(2)(B)-required trial expert reports, neither were they otherwise disclosed by defense counsel prior to trial; – however, several defense experts testified of such at trial. The Janiks could not "fully and fairly" oppose such unfair trial surprises.

[6] This was never produced, despite proper discovery requests that should have "trapped" such information. These are only two illustrations of surprise testimony topics. See 99-11385's opening Brief pages 4-47 for more, which reasserts trial testimony surprises documented in Doc 443.

which were not produced timely to plaintiffs before the discovery cut-off deadline, – **so those "re-cap notes"** ***were not available to plaintiffs when they needed them, to defend against partial summary judgment motions*** (or to fully preparer the Janiks' experts' Rule 26(a) reports), AMICA and IAS/NOBEL both committed *discovery misconduct* that prevented the Janiks from fully and fairly preparing to litigate the triable issues at trial, such that the trial conducted was not a fairly litigated contest of the triable issues.

Thus, some of the Janiks' jury trial rights were deprived by partial summary judgments unwarranted by Rule 56(e), especially since the dismissed counts were not allowed fair discovery due to defendant discovery misconduct. *Accord* Brunet's "Summary Judgment Materials", at 147 F.R.D. 647, 656-657 (1993) (noting 56(e)'s substance-over-form test) *with* **Docs #116, #330, #394,** and **#418**. In other words, partial summary judgment-dismissed counts were unduly guillotined *due to records withheld from plaintiffs,* **and/or** *from "prepped" witness collusion,* either of which causes Rule 60(b)(3) problems. *Thus, a denial of the Rule 60(b)(3) Motion* reaffirms such improper partial summary judgments (*on counts that should have gone to the jury*), since *Rule 26(a)'s automatic disclosure obligations were ignored, facilitating unfairness.*

Plaintiffs were handicapped from a full and fair pre-trial process. For example, 1-6-1997 was the original deadline for all Rule 26(a)(2) expert reports (see **Doc #447**). See also **Doc #418**, page 13, ¶ 4c (*re IAS/NOBEL's Jene Montague's "re-cap notes" being provided to defendants' outside experts, yet were withheld from the Janiks*). This

"other misconduct" is undeniably demonstrated by a discovery dispute hearing – **on April 4, 1997** – whereat Magistrate Judge Kaplan ruled that the Janiks could not redesignate a rebuttal expert as a prima facie proof expert, – nor could the Janiks add another case-in-chief expert (which further enforced the 1-6-1997 expert designation deadline against the Janiks). **Doc 181, pages 3-4.**

Regarding AMICA's and IAS/NOBEL's evasive and dilatory obstructionism regarding **"who 'IAS' is/was"**, which directly related to agency law issues and apparent estoppel issues (*which related to misrepresentation issues, inter alia*), AMICA and IAS/NOBEL both committed discovery misconduct that prevented the Janiks from fully and fairly preparing to litigate the triable issues at trial.

The Janiks were prevented at trial from introducing evidence of Texas Deceptive Trade Practices Act ["DTPA"] liability in this very matter, because one of the Janiks' DTPA counts (against AMICA) was for AMICA's part in violating the identities-confusion DTPA provision (i.e., TEX. BUS. & COMM. CODE § 17.46, § 17.50, etc.), thus matching the content of **the Janiks' 3RD AMENDED COMPLAINT's pages 9-10, 47, 52, 68, 69, 71, 74-75, 84-85,** with said amended complaint alleging DTPA misconduct as violating Texas law. Yet, this DTPA-based liability jury issue was deleted by partial summary judgments, via two of the district court's rulings (**Doc #361** and **Doc #366**). These unfair partial summary judgments (*favoring the insurance defendants*) unplugged the Janiks' ability to introduce trial evidence of identity confusion-based liability based on Texas common law doctrines regarding improperly disclosed agent-principal relationships.

IAS/NOBEL actively resisted proper discovery requests on this topic, so IAS/NOBEL is also guilty of trying to *evade discovery* on this vital liability-relevant matter. (*See* **Doc #447 at Tab I,** in contrast to IAS/NOBEL witness testimony at **Tr. Vol. 6, page 160**).

The Fifth Circuit panel should have noticed that the defendants never denied that they never provided the Janiks with copies of anything written that defined the so-called **"generally accepted claims-handling practices"** that the defense witnesses (including "outside" experts) testified about. The only rational, fair conclusion the panel could make from the defendants' non-production and their non-disclosures (*combined with contradictory, surprising defense testimonies at trial*) is that either such written copies were wrongfully **withheld** from disclosure and discovery, or witness **collusion** occurred, via "prepping" of defense witnesses (*e.g., **"outside" experts who omitted such "#1 ratings" from their Rule 26 reports, yet sang the same "song" at trial**).[7] This clearly tainted the jury trial.*

The Janiks made discovery requests that encompassed this information, and presented evidence of how AMICA's non-productions hindered trial preparation, such as how the surprise trial theme that ***"AMICA routinely gave the benefit of the doubt to its insureds"*** (which defense experts treated as a "fact" on which their

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[7] Defense experts did not disclose any of these testimony surprises (*i.e., the "new" themes in expert opinions at trial*) by original inclusion in their Rule 26(a)(2)(B) expert reports or by any supplements thereof (*or by attorney disclosures*). Yet, these surprises were "milked" by defense counsel in closing argument.

expert opinions relied). This shows **either** withheld trial scripts **or else** unfair oral witness collusion. See Appellants' opening Brief @ 33-34 (re **Doc #443** and **Doc #447**, *citing examples of evasive discovery responses*); see JANIK's SUPPLEMENTAL DECLARATIONS,[8] at **Tab R** (re "reputation deception"/"#1 consumer ratings") and at **R-3** (documenting AMICA's evasive response to **request #34**). The plaintiffs exerted "due diligence" to overcome IAS/NOBEL's evasiveness in discovery. See Appellants' opening Brief @ 33-34 (re **Doc #443**'s incorporation of **Doc #447**, *illustrating evasive discovery responses from all 3 defendants*); see **Doc #447** at **Tab R** ("reputation deception" and "#1 consumer ratings") at **R-3**, *e.g.*, page JL-00598 (IAS/NOBEL's evasive response to **request #108**), page JL-00600 (IAS/NOBEL's evasive response to **request #113**). It is noteworthy that discovery evasiveness can be a basis for Rule 60(b)(3) relief,[9] and that such discovery misconduct need not demonstrate a "nefarious intent or purpose". Anderson v. Cryovac, 862 F.2d 910, 923 (1st Cir. 1988). Such defense misconduct was not merely "accidental"!

Significantly, Rule 60(b)(3) is **not** limited to if/when discovery misconduct was deliberately perpetrated by "fraud":

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[8] **Doc 447** (reproduced in part in RECORD EXCERPTS' **Tab H**), signed by Mr. Janik on 11-14-1999; filed with trial court 11-15-1999.

[9] Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425, 428 (6th Cir. 1996) ("Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case").

> **For [*"other misconduct"*] to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation."** Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions – [or] it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. ***Cf. United States v. One Douglas A-26B Aircraft***, 662 F.2d 1372, 1374-75 n.6 (11th Cir. 1981). . . . We think such a construction not overly harsh; **it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial.** Accidents – at least avoidable ones – should be immune from the reach of the rule. [emphasis added]

MMAR Group, Inc. v. Dow Jones & Co., Inc., 187 F.R.D. 282, 285 (S.D. Tex. 1999), *quoting* Anderson v. Cryovac, 862 F.2d 910, 923 (1st Cir. 1988).

Moreover, the speculative assertion that the "benefit of the doubt" theme repeatedly parroted by defense witnesses" arose coincidentally (**"anecdotally"**) to AMICA's retained non-employee expert witnesses invites imagination-stretching beyond that of any reasonable U.S. court. (***Janiks' appellate Reply Brief @ 2-5.***) Rather, any fair reading of the trial testimony only suggests that the defense witnesses – including the "outside" retained experts (who were not employees of AMICA, a Rhode Island company), – were "prepped" on what to say about AMICA's business reputation, so that the litigation theme of "benefit of the doubt" would appear "coincidentally" out of the mouths of employees and retained experts alike, manipulating the jury with a scripted/false impression of AMICA's business reputation in "the industry".

The defendants' trial usage of quasi-scripted expert testimony on various topics not disclosed in expert reports (*e.g., unproduced* ***"#1 consumer ratings", and about AMICA's purported policy of "giving insureds the benefit of the doubt", etc.)*** caused unfair surprises and prejudices to the Janiks' ability to "fully and fairly" litigate this case at trial. See **Doc #447 @ 8-9** (documenting verified support of kinds of prejudice to Janiks' trial preparation). As shown above, the district court acted as though Rule 60(b)(3) relief can only be grounded on direct proof that an opposing party committed "fraud" or a "withholding of responsive discovery" that was **either** willful non-compliance with Rule 26(a)(1), **or** a willful non-compliance with Janiks' "proper discovery requests".

Although the Janiks have documented both of these (*e.g.*, **Doc #443**), the legal test does not require the Janiks to prove some kind of "fraud" scienter. **However, the Rule 60(b)(3) test is whether the defendants' behavior failed to fulfill their disclosure obligations and/or their discovery obligations, – not why they so failed.** *See, accord,* Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994) (failure to produce relevant documents can be Rule 60(b)(3) "misconduct" even if the failure to produce is inadvertent); Fraige v. American-Nat'l Watermattress Corp., 996 F.2d 295 (Fed. Cir. 1993) (new trial under Rule 60(b)(3) is needed to avoid condoning opponent's misconduct).

The pivotal point here is that **the defendants have never indicated when and how they provided this information via Rule 26 or via discovery responses.** They failed. This failure, in conjunction with their prepping their witnesses to all sing the same "songs" (see **Doc**

#443), proves that the information was made available to the defendants' "outside" experts, yet was withheld from the Janiks – with the result being **"trial by ambush"**[10] on several material facts that *combined to unfairly mislead and taint the jury.*

Thus, the district court and the appellate panel both committed **"abuse of discretion"** by its two denials of the Janiks' Rule 60(b)(3)-based motions, **(1)** because basing a dispositive ruling on incorrect legal conclusions is an abuse of discretion, and **(2)** because basing a dispositive ruling on clearly erroneous material facts is an abuse of discretion. See Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080 (Fed. Cir. 1993), *following* A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1039, 22 U.S.P.Q.2d (BNA) 1321, 3333 (Fed. Cir. 1992) (en banc). Therefore, it was manifest error for the Fifth Circuit to let the defendants "get by" with violations of Fed.R.Civ.P. Rule 26, all such violations being documented with references and quotations, in the Janiks' "MOTION TO RECONSIDER" (**Doc 443**, filed 11-15-1999, – which documentation was herein reasserted on 2-10-2000 (*i.e., in the Janiks' opening Brief for Appeal 99-11385*), yet this **combination of prejudicial surprises** has gone, thus far without any meaningful discussion either by the district court or by the affirming Fifth Circuit appellate panel. Only this Court can require the attorneys and the parties to "play by the [*federal*] rules"; without such enforcement the miscarriage of justice becomes commonplace, with rule violators (*e.g., testifying*

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[10] Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998) **(trial by ambush justifies Rule 60(b)(3) relief to void unfair surprises)**.

experts who add new surprises at trial[11]) being repeatedly rewarded for violating.

Thus, by adopting the trial court's Rule 60(b)(3) opinion, the Fifth Circuit ratified and perpetuated said abuse of discretion. **Lamentably, the effect of the appellate panel's ruling is to facilitate, by denying Rule 60(b)(3) relief, unchecked misconduct that functions like a federal "license" to evade Rule 26 compliance.** In other words, the effect of denying a Rule 60(b)(3) new trial is to provide the insurance defendants in similar cases with a *de facto* procedural permit to withhold relevant disclosure-mandated information (*from the surprised insureds*) and/or to provide witness collusion "scripting", for trials by ambush. This refusal to grant due Rule 60(b)(3) relief defeats the principle of "full and fair" litigation, – in contradiction of the federal policy discussed in Rule 60(b)(3) cases such as Klonoski v. Hahlab, 156 F.3d 255 (1st Cir. 1998), wherein the First Circuit prudently observed:

> If continuances were granted as a matter of course for violations of Rule 26(e)(1), the rule could always be disregarded with impunity . . . if we were to condone the procedure followed by the defendants in this case, then what everyone would do in order to avoid the necessity of disclosing materials that are particularly good for ambushing the other side is not do their investigation until time of trial.

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[11] Also, defense counsel utilized such surprise testimony "opinions" and "facts" self-servingly during closing jury argument.

Accord, see also Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998) (unfair surprises at trial by testifying experts sometimes cannot be cured by a continuance); Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993) (supposedly "impeachment-only" information should have been produced; judgment vacated and new trial ordered); Hickman v. Taylor, 329 U.S. 495, 500-501 (1947) (pre-trial discovery procedures are supposed to reduce the possibility of surprise); United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958) ("a fair contest" is the goal; the discovery rules are supposed to prevent trial from being "a game of blindman's bluff").

Moreover, regarding (1) AMICA's and IAS/NOBEL's undisclosed (*prior to trial*) collusive usage of a so-called **"100% germ-free"** requirement theme at trial, as well as (2) collusive usage of a so-called **"generally accepted claims handling practices"** standard that IAS/NOBEL purportedly practiced, AMICA and IAS/NOBEL both committed discovery misconduct that *prevented* the Janiks from "fully and fairly" preparing to litigate the triable issues at trial, such that the trial conducted was not a fairly litigated contest of the triable issues. AMICA tries to explain the same-song testimony from its witnesses by saying the (*coincidentally similar*) testimony on this topic "appears to be based on anecdotal information exchanged among the various defense witnesses" (AMICA appellate Brief @ 35, 36), – **but isn't such "anecdotal" opinion-expansion just a euphemism for "witness collusion"?**

IAS/NOBEL suggest, in effect, that this issue doesn't justify Rule 60(b)(3) relief, because "it presupposes that some 'document' containing the ["generally acceptable claims handling practices"] standards existed" (IAS/

NOBEL appellate Brief @ 33). However, the "harmony" of same-song-singers (about "100% germ-free") at trial necessarily presupposes some kind of paper-basis for this theme that was **"coincidentally" parroted by "outside" witnesses from geographically removed sources**, a "harmony" that clashed with the documents actually produced by defendants,[12] or else witness collusion.

AMICA and IAS/NOBEL, despite the automatic disclosures mandated by Rule 26(a),[13] and despite direct relevance to the parties' live pleadings and discovery requests, failed to produce any document indicating that the Janiks ever demanded a "100% germ-free" cleaning of their sewerage-germ-exposed property items. Yet, magically, their own out-of-town defense experts obviously relied upon such documents (or else some kind of undisclosed collusion) as a partial basis for their trial testimony on this theme. Despite such "fact" being **absent** from defense expert Shumaker's Rule 26 report, **it surprisingly pops up** in his trial testimony (**Tr. Vol. 6, page 244**). Likewise, such "fact" is ***absent*** from defense expert Quinn's Rule 26 report, ***yet it surprisingly pops up*** in his trial testimony, out-of-the-blue, as a "zero bacteria" demand imputed to Mr. Janik (**Tr. Vol. 7A, pages 42-43, 46**). So, apart from collusively pre-scripted testimony "cues", how can this unfairly surprising theme **"coincidentally"** emerge from the various mouths of the defense witnesses, at trial, with no discovery foundation (*and no*

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[12] See § G-3 within **Doc #446** filed 11-15-1999.

[13] **Both AMICA and IAS/NOBEL avoid arguing about how Rule 26(a)-mandated disclosure noncompliance can trigger Rule 60(b)(3) relief.**

other meaningful disclosure) that appears to justify such a chorus-like harmony in testimony? (*e.g.*, **Tr. Vol. 6, pages 30, 52, 78, 156, 165, 207-208, 210, 244).**[14] **Testimony "scripts" (or some other kind of yet-unproduced "recap"-like expert "testimony outline" notes, never produced to Janiks) must have been used to produce the same-song trial results.** Otherwise, how can out-of-town experts "coincidentally" use opinion foundations that assumed that Mr. Janik demanded a **"100% germ-free"** cleaning? Ambush-like, these out-of-town experts' opinion "foundatoins" were never disclosed or otherwise produced (by a Rule 26(e)(1) report supplementation or otherwise).

Likewise, AMICA and IAS/NOBEL never disclosed or produced any documents (to date) showing, defining, or describing the standards of what are ***"generally accepted claim handling practices"***, – and AMICA also failed to provide any documents that opined, advertised, or objectively demonstrated that it routinely ***"gave the benefit of the doubt"*** to an insured's disputed claim, – yet AMICA repeatedly used expert testimony citing such as being AMICA's standards, – and defense experts Shumaker apparently relied upon such "standards" in his Rule 26 expert report, and such "standards" (*which "standards"*

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[14] Even despite the unfair surprise testimony at trial, the plaintiffs' cross-examination did show that the purported "100% germ-free" demand was contradictable (**Tr. Vol. 7A, pages 42-43**). Were it not for this late-hour unfair surprise "ambush", the cross-examination would have been more effectively focused on this new information, and thus the Janiks' rebuttal testimony could have been "fully and fairly" planned (and trial-time-budgeted) for.

plaintiffs requested copies of during discovery, yet never received such) as a partial basis for defense expert trial testimony, – as appears in expert Shumaker's Rule 26 report and trial testimony (*e.g.*, AMICA's direct in **Tr. Vol. 6, pages 252-253,** as well as IAS/NOBEL's direct in **Tr. Vol. 6, page 257,** and during closing argument, **Tr. Vol. 7B, pages 53-54**).

How can such a chorus-like harmony have emitted from the mouths of out-of-town expert witnesses – on the same undocumented, undisclosed, unproduced theme, – apart from pre-trial "scripting" collusion? Moreover, if no such documents/information exist now (defendants say no such documents now exist), is that because such "testimony scripts" have been quietly **spoliated**? What did the "outside" defense experts rely on for their "fact" basis to support such trial testimony? What disclosure-mandated information was not provided to the Janiks before trial?

Or, if no such documents ever existed, due to a joint defense counsel strategy to orally "script" such "foundation facts" to out-of-town experts, – by "coaching" talks that always avoided saying anything discoverable in writing, – isn't that a Due Process-tainting form of **collusive testimony "misconduct"** (*and a functional equivalent of evasively withholding discoverable documents*), that are "coached" for usage as "foundation facts" for an expert's trial opinions? **Is not such orchestrated usage of such obviously collusive testimony an adequate "other misconduct" ground for Rule 60(b)(3) justice and relief?** In other words, the "no-such-documents-exist" defense, *q.v.*, relied upon by the Fifth Circuit in its MEMORANDUM OPINION AND ORDER OF **10-29-1999** at **page 3**, saying: *"More important, they have not established that any such documents*

even exist"; – and: *"Without showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them"*), – may answer the "withholding documents" problem, **but only to prove that a worse form of abuse occurred**, i.e., WITNESS TESTIMONY COLLUSION.

The district court failed to meaningfully consider (and to grant) plaintiffs' 11-15-1999 Motion to Reconsider Rule 60(b)(3) relief, *despite that said reconsideration motion showed how the 10-29-1999-entered denial ruling conflicted with the evidentiary record*, so it was error to affirm a denial of the 11-15-1999 Motion to Reconsider which sought Rule 60(b)(3) relief for Janiks. However, the Janiks had propounded many specific discovery requests, repeatedly, striving to "trap" various types of withheld documents and categories of information that were either never produced/disclosed by the defendants, – or were produced in a prejudicially dilatory manner so that the Janiks could not designate another expert to criticize such withheld documents' verisimilitude. (**Doc #181**, pages 3-4; **Doc #447** at **pages 3-13**, pages 7-13; **Doc #447's Tab A, Tab D** (@ *D-2, D-3, D-4*), **Tab G** (@ *G-2, G-3, G-4*), **Tab I** (*I-2, I-3, I-4*), **Tab P** (*P-A, P-I*), **Tab R** (@ *R-2, R-3, R-4*), **and Tab X.**

The Janiks' 11-15-1999 Motion to Reconsider raised new and important issues (*as well as reiterating prior issues missed by earlier rulings*), – yet the trial court did not meaningfully consider, as is shown on pages 28-48 of the Janiks' opening APPELLANTS' BRIEF. For example, in **Doc #419**, the trial court ignored **Rule 60(b)(3)** entirely, basing its denial solely upon the outcome-determinative

norm of **Rule 60(b)(2)**.[15] **Tab G** in Janiks' RECORD EXCERPTS herein. This error was raised by the Janiks' POST-TRANSCRIPT RULE 60(B)(3) MOTION (**Doc #437**), so that the trial court could reevaluate the 11-18-1999-filed evidence, using Rule 60(b)(3) norms. But, the trial court then denied this reconsideration motion (**Doc #437**), by **Doc #442** and **Doc #448**, while using an improper legal standard therefor, – finding no proof of specific discovery abuses, – and also finding no complaint allegations that triggered the automatic disclosure mandates of Rules 26(a)(1) and 26(e)(1), etc.[16]

However, the Janiks had already provided such specifically categorized discovery abuse documentation via **Doc #418** (*which the trial court ignored*), the Janiks' 11-18-1999-filed proof (**Doc #418** was the 11-18-1998-filed DECLARATION that provided verified support for the pre-transcript Rule 60(b) motion, **Doc #417**). Moreover, discovery documentation within Janiks' **Doc #418** was incorporated by reference into **Doc #437**, the very post-trial motion that the trial court denied as being "undocumented" via its **Doc #442**. This reference explicitly requested that the court consider Rule 60(b)(3) norms (see **Doc #437**, @ 11, ¶ 6). *Accordingly, **the Janiks did provide specific discovery abuse documentation with their Rule 60(b)(3) Motion**, as well as show how they would have responded to such undisclosed information.* Also, the Janiks

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[15] See ¶ 6 to ¶ 9, pp. 11-12, **Doc #437**, in **Tab J** of RECORD EXCERPTS.

[16] *See, e.g.*, **Doc #442's page 3 (saying "Absent proof of a specific request and the withholding of responsive discovery, however, plaintiffs are not entitled to relief").**

clarified and expanded their Rule 26(a)(1)-based complaint within **Docs #417** and **#418**, – both of which motions were nevertheless immediately denied via **Doc #419**, in so quick and so cursory a manner as to clearly demonstrate *arbitrary and capricious* abuse of Rule 60 discretions.

CONCLUSION

The trial court's own reasoning (*which was adopted by the Fifth Circuit panel, without significant discussion)* is defective in various aspects – aspects that were challenged at the trial court level (by Janiks' 11-15-1999-filed "Motion to Reconsider", which reasserts proof provided via Janiks' declaration filed 11-18-1998), as well as in Janiks' opening Brief to the Fifth Circuit (*e.g.*, 2-10-2000-filed Brief, pp. 4-47).

It was clearly plain error to avoid addressing (discussing) these issues that were raised in the Janiks' appellate Brief, especially since they were not at all meaningfully addressed in the trial court's two Rule 60(b)(3) rulings (i.e., the two rulings being appealed herein).

The Fifth Circuit manifestly erred by not addressing (much less discussing) the witness collusion problem, i.e., the "same song" necessarily proves either document withholding or else witness collusion "scripting", because one or the other was the cause for tainting defense usage of trial expert testimony for "same-singing" opinion surprises.

Also, by affirming the denial of the Janiks' Rule 60(b) motions, the appellate court effectively indicated that compounded examples of discovery abuses are, in effect, "no big deal", so long as plaintiffs cannot easily trace proximately caused damages thereto.

The affirmance of combined rulings below (*involving Rule 56, Rule 59, Rule 60(b), and* **Doc #394***'s quasi-JNOV result*) deprived plaintiffs of 7TH AMENDMENT jury trial rights (*and of 5TH AMENDMENT DUE PROCESS rights*).

So, the Janiks respectfully seek a Writ of Certiorari to issue to the Fifth Circuit Court of Appeals, and, in turn, for other favorable Rule 60(b)(3) relief.

Respectfully submitted,

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